



Neutral Citation Number: [2023] EWHC 2249 (Pat)

Case No: HP-2021-000022

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**  
**PATENTS COURT**

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: Thursday, 7<sup>th</sup> September 2023

**Before:**

**MR. JUSTICE MEADE**

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**Between:**

(1) NOKIA TECHNOLOGIES OY  
(2) NOKIA SOLUTIONS AND NETWORKS OY

**Claimants**

- and -

(1) ONEPLUS LIMITED TECHNOLOGY (SHENZHEN)  
CO., LTD

**Defendants**

(2) UNUMPLUS LIMITED (t/a OnePlus)

(3) GUANGDONG OPPO MOBILE  
TELECOMMUNICATIONS CORP, LTD

(4) OPPO MOBILE UK LTD

(5) ASCENSION INTERNATIONAL TRADING CO.,  
LIMITED (t/a Realme)

(6) REALME CHONGQING MOBILE  
TELECOMMUNICATIONS (SHENZHEN) CO.K LTD

(7) REALME CHONGQING MOBILE  
TELECOMMUNICATIONS CORP LTD

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**MS. SARAH FORD KC and MR. THOMAS JONES** (instructed by **Bird & Bird**) for the  
**Claimants**

**MR. ANDREW LYKIARDOPOULOS KC and MR. RAVI MEHTA** (instructed by **Hogan**  
**Lovells International LLP**) for the **Defendants**

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**APPROVED JUDGMENT: TRIAL E INJUNCTION  
AND STAY, TRIAL D ADJOURNMENT**

**MR. JUSTICE MEADE:**

1. This is my judgment on the central aspects of dispute between the parties on this, the form of order hearing, following my judgment of 26th July 2023. I stated my conclusions at paragraph 350 of that judgment and I will not lengthen my judgment now by repeating those. At paragraph 363, I said that I would have wanted to hold the form of order hearing within 28 days; that would not be possible because of the Vacation; but that I thought it should happen in September, this month. I invited the parties to liaise about timing, which they did, and for that I am grateful.
2. This form of order hearing in what is referred to as “Trial E” is being heard by me in the Vacation, for reasons I have just given, back-to-back with the PTR in Trial D, the FRAND trial, which is for tomorrow. There is some overlap in representation, but not identity. Today, I have heard from Ms. Ford KC, who leads Thomas Jones, for Nokia, and Mr. Lykiardopoulos KC, who today leads Mr. Mehta, for Oppo.
3. A key bone of contention before me today has been whether Oppo ought to be required to make an election between taking the FRAND terms to be decided at Trial, D or otherwise an injunction over the patents so far held to be valid and infringed, of which it may be recalled there are two, ‘103, which is the SEP, and ‘560, which is the NEP.
4. In the event that Oppo does have to make an election, for reasons I will come on to, it has made clear that it will not undertake to accept a licence on the terms determined at Trial D. It says that even on that basis, there should be no injunction, for reasons I will also come on to, but if there is to be the need for an election and if I reject those submissions and find that there should be an injunction, that injunction should be stayed pending appeal.
5. There are, therefore, three scenarios, according to which counsel have argued the matter today: first of all, either no election or no injunction at all, scenario 1; scenario 2, an election is required and an injunction is made but stayed; and scenario 3, the same as scenario 2, but in the event that I refuse to stay the injunction pending appeal.
6. In scenario 3, Oppo contends that Trial D should be adjourned because it would serve no useful purpose, but it says that in scenario 2 and indeed scenario 1, Trial D should go ahead. Nokia disagrees and it says that, as matters have now turned out, Trial D will not serve a useful purpose and should be adjourned in any case. That, Ms. Ford candidly acknowledged, is a change of position, and quite a recent one by Nokia, but I do not attach any great importance to that and both sides have been changing their positions quite freely over the recent days, weeks and months.
7. I have reached a conclusion on this. In the ordinary course of things, I might well have wanted to reserve my judgment and give it in writing, but the imminence of Trial D, the PTR for it and other matters at play at the moment, have led me to conclude that I should give this oral judgment, which, in the way of things, is bound to be rather rougher as a result than would have been a

written judgment, but I am clear in my own mind about my conclusion. I think that the speed of giving my decision is more important than reducing it to writing, with the inevitable delay that would involve.

8. A logically prior matter to deal with is permission to appeal. I have mentioned already the parties' contentions in various scenarios pending appeal. I have indicated that I will give permission to appeal from my judgment in Trial E, since I consider that the various points are arguable to the standard required to give permission to appeal to the Court of Appeal. Matters are complicated because the point raised in *Optis F* (explained in my main judgment on Trial E) is on appeal to the Supreme Court following *Optis F (CA)* (I use herein the same abbreviations as in my main judgment), but I have recently been informed that Apple may, and possibly already has, applied to withdraw that appeal.
9. Regardless of whether Apple does make that application and whether it is successful, Oppo has indicated that it will invite me to grant a certificate under the Administration of Justice Act 1969 to allow the possibility of a leapfrog appeal and I have yet to rule on that. So, at least in principle, it is possible that an appeal from this judgment might be to the Supreme Court, which was going to hear the Apple appeal early next year, or to the Court of Appeal. For that reason, when I refer to an appeal or the appeal, I roll up both those possibilities or, indeed, the theoretical possibility that some points could go to the Supreme Court and others to the Court of Appeal.
10. I should say by way of elaboration on my grant of permission to appeal that I think some of Oppo's points are stronger than others. I focus in particular on the competition law points. Had those been the whole subject of my judgment, I may well not have given permission to appeal on those. They seem to me exceptionally weak and I give permission on those only because of their interaction with the other points in the case. I mention that upfront, simply to dismiss and not need to come back to a point that Mr. Lykiardopoulos made in relation to stay pending appeal, that the competition law point was time-sensitive and might dwindle away to nothing by the time of an appeal. I attach no weight to that, in view of the extreme weakness, as I see it, of the competition law points.
11. However, the other points, in my view, clearly merit permission to appeal. The *Optis F* point has already been given permission for appeal by the Supreme Court and the points which Oppo say distinguish this case from *Optis F*, fundamentally the impact of the Chongqing proceedings, but also the argument that there already is a licence under French law, are complex ones and important ones of law where, although I have ruled against Oppo, there is quite clearly an argument to be made to the contrary, which should be considered by a higher court.
12. I therefore turn to deal with the three possible scenarios identified, (1), (2) and (3). I have received and considered evidence from Mr. Vary of Nokia's solicitors, Mr. Brown of Oppo's solicitors, commercial evidence from Lynn Jiang and Charleen Fang of Oppo, on the real-world irreparable harm which it is said would be inflicted on Oppo pending appeal if there were no stay and

expert evidence of Chinese law from Professor Wang, who gave evidence at Trial E before me, and whose evidence I commented on in my judgment, and Mr. Yuguo Wong of Nokia's Chinese lawyers, in relation to the possible effect on the Chongqing proceedings of an election by Oppo to take the FRAND terms determined at Trial D, to which I will come in a moment.

13. I deal first with whether Oppo be put to an election now, without knowing the Trial D terms and, if it should, and if it does not elect to take those terms, whether there should be an injunction.
14. This is separate, in my view, conceptually, and practically, from the question of how to hold the ring pending the appeal. I am deciding now what the appropriate final relief is. The decision of the Court of Appeal in *Optis F (CA)* is binding on me and they upheld my decision that in circumstances such as the present, the implementer who has been found to infringe a SEP and does not have a licence must make the election without knowing the terms in advance.
15. It is argued by Mr. Lykiardopoulos that that is not an absolute rule and that it is appropriate to depart from it in this case, bearing in mind the relative imminence of Trial D by contrast with the situation in *Optis F*, where there was anything up to a year between my consideration and the likely FRAND trial.
16. I do not rule out absolutely the possibility that there might be circumstances in which a court would depart from the general decision in *Optis F* but, in my view, it is a strong decision in favour of implementers in this sort of situation being put to election, and given we are now in September and that a judgment in Trial D, in the absence of an adjournment of course, and further argument means that the final resolution of that trial could be six months away, that persuades me that the time yet to elapse in which, on the hypothesis on which I am proceeding, Oppo would be operating without a licence, is significant, and I see no reason to depart from the general *Optis F* position. Therefore, Oppo must elect between committing itself to the Trial D terms or an injunction and for reasons I shall come on to shortly, it has made clear that its election is, if it must make an election, for an injunction.
17. Oppo also argues that in a case that is all about money, even if it must elect, there should still be no injunction because, essentially, damages are an adequate remedy. This is, to some extent, related to the question of how long will be the period between now and the FRAND trial but, in any event, the argument that, in circumstances such as those presently before me, damages are an adequate remedy, was rejected by the Supreme Court in *UPSC*, which I revisited in some detail in *Optis F (HC)*, and my decision in that case was upheld by the Court of Appeal.
18. Therefore, in my view, the election must be made. Oppo has made it clear that it prefers an injunction to committing to the FRAND terms from Trial D and, therefore, that will be the result.

19. I need to turn to Oppo's reasons for making that decision. Oppo says that if it agrees to be bound by the terms at Trial D, that could have an adverse and possibly fatal impact on the Chongqing proceedings because it says the Chongqing court might, in that scenario, consider that its own proceedings had been rendered moot because Oppo was licensed globally to Nokia's portfolio.
20. This argument was touched upon, but not explored in any detail at Trial F and that is a matter that I touched on in paragraph 16 of my judgment, where I expressed some scepticism about it. I recorded that it was not an issue of Chinese law that I was invited to decide.
21. This is all somewhat hypothetical, because whether or not Oppo's reasons are good or bad or somewhere in between, it has, in its own mind, decided that it will not elect to accept the Trial D terms, but I none the less think it worth explaining what the reasons are said to be in a little bit more detail.
22. Had Oppo elected to undertake to take the terms from Trial D, Nokia accepts, and it would in any event have been my decision, that that undertaking should be capable of being released if Oppo were successful on appeal. Nokia also agreed that it would not, in that scenario, use the election by Oppo as a basis for seeking to stay or have dismissed the Chongqing proceedings, and Nokia accepts that if the result of the undertaking was that a licence actually entered into force prior to an appeal, the licence would need to be arranged so that payments made under it were repaid.
23. Although I do not regard it as critical to my decision, the parties have argued in some detail what the reaction of the Chongqing Court would be, and as I have said already, that is the subject of evidence from Professor Wang and Mr. Zuo.
24. Both of those experts agree, to this limited extent, that there is no firm guidance from the Chinese courts on what should happen in the current situation. Each of them has referred to some extremely limited materials, more so Mr. Zuo than Professor Wang. Mr. Zuo refers to two Articles of what are called the new amendments to the Chinese Civil Procedure Law, Articles 280 and 281, which he says might be regarded as applicable by analogy and also to two cases, one in the US and one in China, between Huawei and Samsung.
25. Professor Wang does not say that it is certain that the Chinese court would stay or dismiss the Chongqing proceedings, although she says it is possible and she offers the opinion that it is likely. Mr. Zuo disagrees on the strength of the two Articles that I have referred to and the *Huawei v Samsung* cases. Without going into details, Oppo argues that Mr. Zuo's materials are all about jurisdiction and the situation that arises in the present case is a different one, in particular whether the Chongqing proceedings would be rendered moot by Oppo's undertaking here.
26. The position is further complicated by the fact that, of course, if Oppo did give an undertaking, for reasons I have touched on already, that would be qualified so that the undertaking could be withdrawn following an appeal. Professor

Wang deals with that in paragraph 2.6 of her report, to say that it would not affect her analysis. She said the following:

“I consider that once the Plaintiff has indicated that it will be bound by the decision of a foreign court then the possible outcomes are as described above ...” and I interpolate, those include stay or dismissal “... as the PRC Court would focus on the actions of the Plaintiff in committing to take the terms set by the foreign court, and not any possibility of the situation changing in the future.”

27. I do not feel able to reach a firm conclusion about the level of risk that the Chongqing court would stay or dismiss its proceedings, but doing the best I can, I think the risk of the Chongqing Court staying or dismissing them is low.
28. The Chongqing proceedings are extremely well-advanced. All the written and oral argument has been concluded and what remains is for the Chongqing Court to write and deliver its judgment. In a situation where it is that close to a result and where the situation is that Oppo might or might not enter into a licence in the UK, it seems to me inherently very unlikely that the Chongqing Court, of its own motion (given Nokia accepts that it will not seek stay or dismissal), will terminate or delay its proceedings.
29. However, I do conclude that the risk is not such that it can altogether be rejected and I take the view that that risk is part of Oppo’s reason for not committing to the terms which will come out of Trial D, but I do not feel that I have a full understanding of Oppo’s reasons. Oppo’s evidence has focused on the risk that I have been discussing, but I am sure there is more to it than that.
30. In any event, as I have said, it is a risk that cannot be rejected. It forms part of Oppo’s thinking, and rightly or wrongly it has concluded that it will not commit to the Trial D terms.
31. My conclusion, therefore, on the first issue is that Oppo must make its election. It has been made clear what that election is; there is no other reason not to grant an injunction and I will do so. There is a point of some potential importance about what the form of that injunction should be, which I will return to with the parties at the conclusion of this judgment or shortly after. I mention it only to make it clear that I have not overlooked that and I still need to decide that. I mention in passing that there are various other points of detail which I have said I will deal with after I cover these main points.
32. The second scenario is that Oppo makes its election but that injunction, which I have held should be granted, should be stayed pending appeal. To deal with this, I need to determine, of course, whether there should be a stay pending appeal. If there is not a stay, then Oppo will come off the UK market in short order, the precise details being the subject of debate, just as it had to come off the market in Germany when Nokia enforced injunctions that it had obtained there.

33. Oppo, as I said already, put in evidence from its commercial personnel in the form of Lynn Jiang and Charleen Fang, and those witness statements go into considerable detail about the effect that an injunction would have and deal with the scenario which is the relevant one to consider for my present purposes of what would happen if Oppo had to come off the market for the period between now and an appeal from Trial E and then try to re-enter the market after a successful appeal.
34. I will come to the categories of irreparable harm that are mentioned in a moment, but first I record that there was no significant dispute between the parties on the principles to be applied to the grant or refusal of a stay. Nokia referred to the well-known *3M* decision, [1976] RPC 671 at 676, which has been cited with approval repeatedly. Oppo, for its part, cited some of the cases in which that has been applied, in particular the recent decision of the Court of Appeal in *Neurim v Generics* [2022] EWCA Civ 370, about the importance of the *status quo* and before that *Novartis v Hospira* [2013] EWCA Civ 583, which affirms that the court's task in deciding whether to stay an injunction pending appeal is essentially, and certainly for present purposes, the same as when considering whether to grant or refuse an interim injunction pending trial. Oppo also referred me to the Enforcement Directive and to the decision of Arnold J (as he then was), considering that in *Nokia v HTC* [2023] EWHC 3778. As I say, although these well-known decisions were cited to me, there was no dispute between the parties on the principles to be applied.
35. Ms. Fang, in particular, explained the effect of an injunction for a limited period under the following headings: "impact on commercial ranging timelines", which dealt with Oppo's relationships with carriers, "switching losses due to multi-year contracts with operator partners", "unquantifiability of lost sales during an injunction period", "loss of opportunity to stabilise market ranking", "brand damage, loss of trust and loss of customers", and "reduced innovation". Oppo also relies on reputational damage generally.
36. Some of these, I think, are perhaps slightly overplayed. When it comes to reputational harm, I think at least the carriers, if not customers, will understand that Oppo's actions are driven by litigation brought by Nokia and not Oppo itself. But, none the less, I accept Ms. Fang's evidence that relationships with important players in the market and customers generally will be damaged in a way which, in my assessment, would be significant and unquantifiable and would not be at all easily reversed. I also accept that trying to quantify compensation *ex post*, if Oppo comes off the market and then is restored to it following an appeal, would be formidably difficult to the point of impossible.
37. I also note, and it is an important part of my thinking, that Nokia has not really answered any of these points in its evidence and has sought, instead, to make a few arguments orally or in writing which are not supported by evidence. For example, Ms. Ford relied in argument on the notion that royalties from other licensees might be affected, that Oppo might be on the market with a lower cost base pending an appeal and other similar points. But, these points would need to be made good in evidence and, in any event, Oppo's evidence, which I

find cogent and detailed, really supports what would be one's intuitive impression anyway. I, further, would attach very considerable importance to the fact that Oppo has been on the market for a long period with Nokia's licence, and since then after the 2018 licence expired in 2021, and that the grant of an injunction pending an appeal would be a very serious disturbance to a well-established *status quo*.

38. So, for those reasons, in terms of what I would call the traditional matters going to the balance of convenience pending appeal, I would stay the injunction, which I have decided to grant.
39. This forms a natural segue to the question about what should happen to Trial D. Trial D is now only three weeks away. I have the PTR in that trial scheduled for tomorrow. I have done my preparation for the PTR and, I have to say, reading the skeletons of both sides for that PTR, I formed the impression that there was still quite a lot to do before Trial D, but I, none the less, will to proceed on the basis that, with some appropriate management, Trial D could be kept well on track for a hearing this term.
40. That, however, is not the problem, or at least it is not the issue. The issue is one of timing and of trying to arrange matters so that whichever way the appeal from Trial E goes, the parties can be put back, as best as possible, in the position they ought to have been.
41. The timing issue is that the licence to be debated at Trial D, on both sides' position, only runs to the end of June 2024 and a result from Trial D will not emerge until early 2024, assuming, as is my intention in keeping with normal practice, that I would be able to give judgment in three months. But even then there will be inevitably a consequential hearing from that trial. The effect of Trial D, therefore, is, unfortunately, very much backwards looking.
42. Nokia's position is that if Oppo, as it has now made crystal clear, is not willing to commit now to take the licence at Trial D and may well refuse to take it after that trial – which I infer is more than possible and indeed highly likely – Trial D is a waste of time and money and that what is needed is a resolution of what Oppo has to pay for a meaningful period of the future.
43. It is fair to say, as I have touched on already, that this is a position that Nokia has taken only extremely recently. I have to say that, in retrospect, it perhaps unsurprising that we are in the present position, by which I mean close to Trial D that will only determine licence terms that would only run for a short time into the future and with Oppo declining to commit to take the licence, and I wish that had been borne in on me earlier. None the less, I have to decide in a practical sense and in a fair way how to proceed for the future.
44. Oppo, as I have said already, agrees that Trial D should be adjourned if there were no stay of the injunction. That does not arise now, because I have held that there should be a stay, but I think its agreement that Trial D should be adjourned in that scenario is important because it indicates that Oppo cannot regard the adjournment of Trial D as a disaster and it is something that Oppo regards as an event that can be countenanced. The difference between the



parties is whether Trial D should be adjourned in the scenario that I have arrived at, which is where Oppo has to elect, chooses an injunction, but the injunction is stayed.

45. I turn to consider the possible scenarios following an appeal. If, on appeal, the result of Trial E and/or the result of Optis F is reversed and it is held that Oppo is entitled to see FRAND terms before it decides whether to commit to them, then, if Trial D has been adjourned, it will not be liable to an injunction. It will have remained on the market and, as Ms. Ford accepts, it will be entitled to remain on the market going forward from there until FRAND terms are determined. In that scenario, it seems to me that Oppo is fully and fairly protected.
46. If, on appeal, the result of Trial E and/or Optis F is maintained, and therefore the result is that Oppo ought to have had to commit to a FRAND licence without sight of the terms, and if Trial D is adjourned, then it seems to me that in broad terms, the parties will be back where they ought to have been (albeit later).
47. I have been more concerned about the scenario where Trial D takes place, a result is known, Nokia prevail on appeal on Trial E and Oppo then gets the opportunity to decide whether or not to take FRAND terms (by saying that it then *does* want a licence after all), when it has been able to fight out the FRAND terms. That seems to me to rob Nokia of the effect of the Optis F result, even as the Optis F result is upheld on appeal. It also raises the undesirable possibility of the parties having conducted Trial D, only for Oppo to reject the terms and for all of that effort to have been wasted. In saying that, of course, I recognise that much of the effort to prepare for Trial D has already been incurred.
48. Earlier in the hearing before me today, Mr. Lykiardopoulos's submissions focused on Trial D going ahead (in the event of a stay of the injunction) being the best, perhaps the only, way for Oppo to hold open the possibility of remaining on the UK market in due course. I do not accept that. It seems to me that if Trial D does not go ahead and Oppo wins on appeal, then Oppo will remain on the UK market. If Trial D does not go ahead and Oppo loses on appeal, then I would expect at that stage it will be able to commit to FRAND terms, although it will have to do so sight unseen, as Optis F which, in this scenario will have been upheld, decides that it ought. It can still stay on the market if it wants to, though.
49. I therefore reject the submission that Oppo needs Trial D to go ahead, even when there is a stay, to preserve its ability to stay on the UK market. I note that although Oppo's evidence in support of a stay, in a conventional sense, was detailed and cogent, what Mr. Lykiardopoulos said about holding on to the UK market, depending on whether or not Trial D was adjourned, was not supported by evidence.
50. In later reply submissions, Mr. Lykiardopoulos stressed, much more strongly – I thought the submission was made for the first time, but in any event it came to the fore for the first time – the possibility that Trial D might provide useful

guidance about what the right answer to FRAND was for these parties, even though a licence going forward, by which I mean from July 2024 onwards, would be bound to be on different terms, because it would be based on different actual or forecast sales. Mr. Lykiardopoulos also submitted that a result in Trial D might provide terms which Oppo, once having seen them, would actually accept (so giving it a global licence until mid-2024 which might bring an end to the international litigation if accepted). That goes back to some extent to the points I have made already about putting the parties back in the position they should have been following an appeal.

51. I do not accept these submissions. I must say I do not understand fully or well Oppo's thinking in insisting strongly on Trial D happening at this stage and in this scenario. It seems to me inconsistent with Oppo's positive assertion that there should be an adjournment if there is no stay of the injunction, a scenario which, of course, I have rejected, and also with Oppo's conduct throughout these proceedings in which it has stressed that the right venue for the FRAND decision is Chongqing, that it might wish to apply to stay Trial D if it prevailed in Chongqing sufficiently soon, and its submissions about its fallback declaration in Trial E, that Trial D should await the result in Chongqing and only take place in the sense that Nokia would have the opportunity to argue that the Chongqing result should apply differently in the UK. Again, there is no evidence in support of the submission that Trial D will provide important commercial guidance going forwards or, indeed, that Oppo might accept the terms so as to bring it global patent peace for the first few months of 2024.
52. For all those reasons, I attach no weight to that consideration but, none the less, it has to be a matter of very important concern to the court (and it is) that what Nokia proposes and Oppo opposes, in the scenario I have reached about relief, is the adjournment of a trial which is close to being ready and has been scheduled for some time.
53. Had the timing difficulty that I referred to earlier in this judgment been borne in on me earlier in these proceedings, I think, with some confidence, that my reaction would have been to suggest that the licence to be settled needed to have a longer term than the three years on which basis the parties were proceeding. That did not happen but, none the less, I think it is an important consideration that with all the efforts the courts of this country have given to these proceedings, it would be much more desirable to have a long-term decision for the future than a backward-looking decision which is only even argued to have advisory weight.
54. Nokia's proposal is that in the scenario which has now eventuated which, as I have said already, with the wisdom of hindsight I think was foreseeable, but was not in fact foreseen by it and certainly not provided for, Trial D does not make sense and what is needed is a determination which covers not only the period 2021-2024, but a substantial period going forward.
55. After anxious consideration and bearing in mind that it is always a very, very significant matter to adjourn a trial, I conclude that Nokia is right about this. Not only is Trial D of extremely limited utility (if any) now, but I assess the

chances, doing the best I can, that Oppo will accept the terms that come from it as being very low indeed and the likelihood is that it would at most resolve some points of principle, which could have relevance to a licence going forwards, but will not give the parties the clarity and confidence to be able to predict what the right answer is for the period going forwards.

56. I also think that the adjournment of Trial D will enable the appellate court (whether the Court of Appeal or Supreme Court), whichever way it decides things, to put the parties back where they ought to be, following a resolution of the appeal from Trial E.
57. I also emphasise that I do not think that Trial D will even resolve the backward-looking question of damages for infringement of Nokia's patents over the period of unlicensed use in the event that Oppo declines to take the terms decided. That is a distinct question which is not currently in Trial D, although there have been arguments about how that might be brought about.
58. So, for all those reasons, and after considering it carefully, in the quite exceptional circumstances of this litigation, I adjourn Trial D. I do so in the understanding that the adjournment could be quite a lengthy one. It cannot be assumed that another three or four weeks can be found easily in the court diary very soon. It may be that the steps that are necessary to re-plead the issues and update them so that the trial has meaningful forward-looking effect are not too extensive, as Ms. Ford submits. I might be wrong about that and it might be quite an effort, but the real limiting factor, in my view, about bringing back Trial D, is going to be the availability of a court slot. However, there is also a real chance that court time can be found within fairly few months.
59. That is my conclusion on the relief to be granted and on the question of Trial D.

***(For continuation of proceedings: please see separate transcript)***

60. The next issue I have to consider is the form of the injunction to be granted and the bone of contention between the parties here is whether the injunction should be unless and until Oppo undertakes to enter into a FRAND licence or on the other hand unless or until the defendants, Oppo, actually enter into a FRAND licence.
61. It is pointed out to me by Nokia, who contend for the second form of injunction, that that is what Birss J (as he then was) did in *Unwired Planet*, the original genesis of the FRAND injunction. But I accept Oppo's submission that that cannot be unthinkingly applied because, at that stage, Birss J, had decided the FRAND terms and it was expected that the defendants would take that FRAND licence, whereas the present situation is not such.
62. Nokia's concern about the formulation which causes the injunction to lapse as soon as Oppo undertakes to enter into a FRAND licence is that Oppo has some tactical intention to reach a situation where it can obtain a timing advantage by agreeing to enter into a FRAND licence with a further period of ability to operate on the market when the terms are not known.

63. In my view, the problem with both approaches is that there are a lot of different scenarios that may yet arise and trying to cater for everything that could happen by the choice of one form of words now or another is a risky approach. Whether an undertaking by Oppo to enter into a FRAND licence will always be enough for an injunction to come to an end is not a conclusion that I think I can safely reach at the moment.
64. In my view, the safest and best course is to do what Nokia seeks and provide that the injunction must cease to have effect if Oppo enter into a licence – clearly that carve-out must be there – but to give Oppo liberty to apply to have the injunction lifted upon its giving an undertaking to enter into a FRAND licence, in the expectation that there will be legitimate situations where Oppo would want to do that, but where an automatic lifting of the injunction unconditionally would be inappropriate.
65. I have in mind, in particular, that it might be inappropriate to let Oppo out from under an injunction if it was obvious that there were very large amounts that were payable, either for the past or going forwards, and which it ought to have to pay before it was able to re-enter the market. I therefore make the injunction in the form contended for by Nokia with an appropriately worded express liberty to apply, which I will leave it to counsel to draft.

*(For continuation of proceedings: please see separate transcript)*

66. The next point I have to deal with is whether there should be a stay of the injunction on EP 560. This is a non-essential patent which was the subject of the trial in the '023 action, in respect of which it is accepted that it is possible to modify Oppo's products to avoid infringement.
67. Oppo has not put in any evidence that there would be irreparable harm involved in making this change and, therefore, normally it would follow that there ought to be an injunction and I accept Ms. Ford's general submission that an injunction follows a finding of infringement and there ought to be no stay unless there is some prospect of irreparable harm.
68. What makes this situation slightly different is that Nokia accepts that if a FRAND licence is settled in the UK, it is willing but not obliged to include a standstill which would effectively rule out an injunction from then on in relation to EP 560. Oppo relies on this in seeking a stay of the injunction on EP 560.
69. The problem with Oppo's submission is that Nokia has not accepted that Oppo is entitled to a standstill. Nokia's concession is very carefully limited to the UK, and it has made no such concession in Chongqing or in relation to any other means by which Oppo seeks a licence. It seems to me that it is illogical and unfair for Oppo to say that it will get a standstill from Nokia, because of Nokia's concession. It will only do so if it agrees to FRAND terms in the UK, which it stoutly resists. So I do not think a stay in relation to EP 560 is merited.

70. I do find some attraction in Oppo's submission that it could well turn out to be rather pointless work, designing round the patent. On the other hand, it might be something that Oppo would consider sensible anyway and may well have done, to some extent, but as a matter of principle I do not think that a stay in relation to EP 560 is appropriate.

*(For continuation of proceedings: please see separate transcript)*

71. Paragraph 9 of the draft order relates to '560 and the respective contentions are that Nokia says that Oppo must take all reasonable steps within its power to retrieve from distribution channels infringing product and Oppo proposes a more limited and more specific requirement to issue recall notices to its distribution channels.
72. My understanding of phrases such as "all reasonable steps within their power", "best endeavours" and the like, without going into the fine detail, is that they are extremely demanding and that they put a severe burden on a party subject to them to take even very onerous grave steps. I think that is unjustified in circumstances where the actual sale of products which infringe '560 has no different commercial impact on Nokia from ones which do not infringe '560. Nokia will get appropriate damages in due course, if EP 560 finds a life of its own in that sense, which one hopes may be avoided, but in principle could happen, and I prefer the clearer and more specific requirement of Oppo's wording, which in any event I think is a fair degree of protection for Nokia.

*(For continuation of proceedings: please see separate transcript)*

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**(This Judgment has been approved by the Judge.)**

**High Court Approved Judgment:**  
**Meade J**

Nokia v Oppo Trial F form of order, Trial D adjournment  
07.09.23



Neutral Citation Number: [2023] EWHC 2250 (Pat)

Case No: HP-2021-000022 and 000023

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**  
**PATENTS COURT**

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: Friday, 8<sup>th</sup> September 2023

**Before:**

**MR. JUSTICE MEADE**

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**Between:**

(1) NOKIA TECHNOLOGIES OY  
(2) NOKIA SOLUTIONS AND NETWORKS OY  
- and -

**Claimants**

(1) ONEPLUS LIMITED TECHNOLOGY  
(SHENZHEN) CO., LTD  
(2) UNUMPLUS LIMITED (t/a OnePlus)  
(3) GUANGDONG OPPO MOBILE  
TELECOMMUNICATIONS CORP, LTD  
(4) OPPO MOBILE UK LTD  
(2) ASCENSION INTERNATIONAL TRADING  
CO., LIMITED (t/a Realme)  
(3) REALME CHONGQING MOBILE  
TELECOMMUNICATIONS (SHENZHEN)  
CO.K LTD  
(4) REALME CHONGQING MOBILE  
TELECOMMUNICATIONS CORP LTD

**Defendants**

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**MS. SARAH FORD KC and MR. THOMAS JONES** (instructed by **Bird & Bird**) for the  
**Claimants**

**MR. ANDREW LYKIARDOPOULOS KC and MR. RAVI MEHTA** (instructed by **Hogan  
Lovells International LLP**) for the **Defendants**

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**APPROVED JUDGMENT – COSTS AND  
LEAPFROG APPEAL**

**MR. JUSTICE MEADE:**

1. I have to deal with three matters concerning costs. The first is the costs of Trial E, the second is the post-trial costs in the 023 action, which concerned the NEP, and the third, raised by Oppo this morning, is the costs of this hearing; in other words, the hearing yesterday and today about the form of order.
2. I address first the costs of Trial E, where the parties agree that the applicable principles are the well-known ones arising under CPR Part 44, which is that I must enquire whether there are suitably circumscribed issues on which the overall winning party, which is agreed to be Nokia, was unsuccessful, and if I do identify any such issues, then I have to consider whether Nokia should, first of all, not recover its costs and then further enquire whether there are sufficient factors, such that Nokia should, in addition, have to pay Oppo's costs.
3. Those principles are, to some extent, applicable to the third issue, or at least given the way it was argued before me today, about the costs of this hearing, but primarily I am now dealing with the costs of Trial E.
4. Oppo contend that there were issues on which Nokia did not succeed and those relate to the issues of French and Chinese law. In terms of quantification, a calculation has been put forward in the evidence of Mr. Brown, of Hogan Lovells which, by a page-counting exercise, attributes the overall percentages attributable to French and Chinese law by looking at the pleadings, the skeletons, the list of issues and the transcripts. Roughly speaking, the numbers come out to 15%. Since Oppo contends that Nokia ought to not only not recover its costs but pay Oppo's costs, that would amount to an overall reduction in Nokia's recovery of 30%.
5. Much of the foreign law was not in dispute by the time of trial and that was through the process of pleadings, exchange of expert reports, skeletons and so on and so forth and by the preparation of the document which I directed on foreign law and to which I refer in the Trial E judgment. I will say straightaway that I think it must be wrong in principle for Oppo to contend that Nokia ought to have to pay all the costs of the foreign law since much of that, if not most, is attributable to matters on which Nokia was not unsuccessful: the matters were agreed.
6. None the less, I can see from the figures in PJB-51 what was the approximate percentage of time spent at trial on the issues which were in dispute which, in relation to French law, was essentially the requirement of determinability for contracts and in relation to Chinese law was in relation to hard-edged FRAND and the treatment of matters on FRAND in the Chinese authorities such as *InterDigital*, to which I refer to in my judgment. For the trial, Mr. Brown comes up with numbers which are overall similar to the 15% for the conduct of the case as a whole. These seem about right to me, and these were points on which Oppo was indeed successful. But that does not mean they were "issues" within the sense of the exercise required by CPR Part 44.



7. It is always a value judgment for the court to identify what is meant by an issue on which the winning party was unsuccessful. It is possible to characterise an issue at the trial having been what the standard of determinability under French law for contracts is. Alternatively, one can phrase the issue more broadly, as Ms. Ford did for Nokia today, by saying that the issue was whether Oppo was already licensed under French law.
8. Mr. Mehta undertook the oral advocacy on these points today for Oppo and in his helpful and able submissions, he primarily characterised the issue as being “the foreign law”. I reject that for reasons I have already given. Nokia was not unsuccessful in relation to foreign law as a whole, but I think the underlying spirit of Oppo’s argument on this point is that the issue on French law was determinability and, under Chinese law, the two matters that I have referred to already.
9. In my view, the issues are much more appropriately assessed at the level for which Nokia contends, which was whether Oppo was already licensed under French law and whether Nokia was entitled to choose as between a rate set in Chongqing and a rate set in the UK. Nokia succeeded on both of these issues and I therefore do not consider that there is any issue in a meaningful sense on which Nokia was overall unsuccessful.
10. I think that Oppo’s treatment of the matter slices matters much too finely. It is always possible at an atomic level to describe an issue within a greater issue on which the overall successful party has failed and it is a value judgment as to whether that is the appropriate assessment. But I think Nokia is right on this overall point. I think that also does broad justice because the parties worked diligently to reduce the disagreement on foreign law in a way which was widely successful and for which I am grateful. I think trying to pick out these minor bones from that broader body of work is not an appropriate exercise. So, I decline to make any reduction in Nokia’s costs of Trial E.
11. I turn to the second point, which is the post-trial costs of the ’023 action. This was a complicated situation and when I came to deal with the form of order on ’023, Nokia sought an immediate injunction and Oppo opposed that. The issues going to that question were broad, diverse and quite complicated. Ultimately, I made an order (and this was paragraph 2 of my order of 14th December 2022) that in respect of the claimant’s post-trial costs, 50% were reserved to the judge hearing Trial E in the ’022 action, which, of course, in the event is me.
12. Two important things have happened since then. The first is I have given judgment in Trial E and I have held that Oppo was not in fact already licensed under French law and still is not licensed for the Nokia implementation patents. Indeed, yesterday I granted an injunction over the EP 560 patent and declined to stay it.
13. Importantly, however, on the other side of the scales, Nokia has, since the ’022 form of order hearing, conceded that a licence set by this court for its portfolio will include a standstill covering its implementation patents which,

for reasons covered in my judgment in Trial E, is not identical to a licence, but has the same effect in terms of there not being an injunction.

14. Mr. Mehta, for Oppo, argues that Nokia should have made this concession much earlier. Indeed, I think implicitly that it should have made that concession by the time of the form of order hearing in the '023 action, and that had it done so, those 50% of costs would not have been incurred at all. Were it not for this balancing point, it seems to me that Oppo would have no argument at all, because Nokia has been successful and has obtained an injunction on EP 560, so my analysis must focus on the point about Nokia having made a concession.
15. In my view, although Nokia has agreed that any licence settled by this court for its portfolio and to which Oppo commits to take will include a standstill, that is not a concession or a late concession in the sense of Nokia coming to a realisation that its position is untenable and that it must include a standstill. It is, as Ms. Ford submits, in my view, a pragmatic decision that Nokia has taken and not a surrender. Furthermore, Nokia has only made the concession in relation to a licence set by this court and to which Oppo commits.
16. In my view, that is quite different from Nokia having, in any way, given up or accepted that it was wrong. So I do not consider that Nokia's change of position is any reason to adjust the costs order which would otherwise follow, which is that Nokia having been successful in getting an injunction on EP 560 – which, with the benefit of hindsight, one can say it was entitled to at the time of the '023 form of order hearing – is entitled to all the costs of the post-trial phase of the '023 action and that is my conclusion on that.
17. The third point is the costs of this hearing. Mr. Mehta makes the point that much of the costs of yesterday's phase of this hearing, on the Oppo side, were devoted to the evidence which was necessary to support its application for a stay of any injunction pending appeal and that application for a stay has been successful.
18. Oppo's contention is that Nokia should pay the costs of yesterday's hearing. Nokia's contention is that the right order is costs in the case which, since it is accepted that Nokia is the overall winner, would mean that Nokia gets the costs.
19. I consider that Ms. Ford is right about the general proposition and that Oppo would need to make an argument to displace that. I accept that Oppo has incurred, no doubt, significant costs in putting together its evidence about the irreparable harm that it would suffer. But, for the reasons given in my judgment yesterday, Nokia did not really join issue with that in its evidence and although a faint argument was made by Ms. Ford, Nokia did not really cause any costs post-Oppo's evidence to be incurred about the issue of irreparable harm. Furthermore, other matters yesterday went in Nokia's favour. In particular the argument about the adjournment of Trial D on which Nokia was successful, was tightly integrated with the question of stay and the future conduct of this action in general.

20. I do not see any reason why Nokia should have to pay Oppo's costs of putting forward its case on irreparable harm. Were I to deprive Nokia of its costs on irreparable harm, those would be trivial, in any event, because that is not the way Nokia argued matters yesterday.
21. So, in general, I do accept that Oppo has achieved some modest degree of success over the course of the hearing yesterday. Other matters were matters relating to management of the action post-trial in the usual way and matters that Nokia was successful.
22. None of this, in my view, is adequate to displace the general proposition that the post-trial costs are costs in the case and therefore in practical terms are the costs of the winner.

*(For continuation of proceedings: please see separate transcript)*

23. I now have to deal with Oppo's application for a certificate under the Administration of Justice Act 1969 and what is usually referred to as a leapfrog appeal. My powers arise under section 12 of the Act as follows:

"12 Grant of certificate by trial judge.

(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied —

(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings or that the conditions in subsection (3A) ('the alternative conditions') are satisfied in relation to those proceedings, and

(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal ...

the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.

(2) This section applies to any civil proceedings in the High Court which are either —

(a) proceedings before a single judge of the High Court ...

(b) ...

(c) proceedings before a Divisional Court.

(3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public

importance is involved in that decision and that that point of law either —

(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or

(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the Supreme Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Supreme Court (as the case may be) in those previous proceedings.

(3A) The alternative conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in the decision and that —

(a) the proceedings entail a decision relating to a matter of national importance or consideration of such a matter,

(b) the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that, in the opinion of the judge, a hearing by the Supreme Court is justified, or

(c) the judge is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

(4) Any application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings:

Provided that the judge may in any particular case entertain any such application made at any later time before the end of the period of fourteen days beginning with the date on which that judgment is given or such other period as may be prescribed by rules of court.

(5) No appeal shall lie against the grant or refusal of a certificate under this section.

(6) Her Majesty may by Order in Council amend subsection (3) of this section by altering, deleting, or substituting one or more new paragraphs for, either or both of paragraphs (a) and (b) of that subsection, or by adding one or more further paragraphs.

(7) Any Order in Council made under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this Part of this Act ‘civil proceedings’ means any proceedings other than proceedings in a criminal cause or matter, and ‘the judge’, in relation to any proceedings to which this section applies, means the judge ... referred to in paragraph (a)... of subsection (2) of this section, or the Divisional Court referred to in paragraph (c) of that subsection, as the case may be.”

24. It is to be noted that under sub-section (4) of section 12, the application has to be made no later than 14 days from the date on which judgment was given and Oppo met that time period.

25. If I grant a certificate under section 12, that does not of course compel the Supreme Court to take the appeal and that is provided for in section 13, which is as follows:

“Leave to appeal to Supreme Court

(1) Where in any proceedings the judge grants a certificate under section 12 of this Act, then, at any time within one month from the date on which that certificate is granted or such extended time as in any particular case the Supreme Court may allow, any of the parties to the proceedings may make an application to the Supreme Court under this section.

(2) Subject to the following provisions of this section, if on such an application it appears to the Supreme Court to be expedient to do so, the Supreme Court may grant leave for an appeal to be brought directly to the Supreme Court; and where leave is granted under this section —

(a) No appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but

(b) an appeal shall lie from that decision to the Supreme Court.

(3) Applications under this section shall be determined without a hearing.

(4) ...

(5) Without prejudice to subsection (2) of this section, no appeal shall lie to the Court of Appeal from a decision of the judge in respect of which a certificate is granted under section 12 of this Act until —

(a) the time within which an application can be made under this section has expired, and

(b) where such an application is made, that application has been determined in accordance with the preceding provisions of this section.”

26. The circumstances of this application are unusual, in the sense that a central aspect of my judgment on Trial E relates to the decision on what I call the Optis F point and in respect of which the Supreme Court has given permission to appeal to Apple, which appeal is due for hearing early next year.
27. However, a further complication is that I am told that Apple has applied or is likely to apply in the near future to withdraw that appeal, for reasons which I do not know in detail, but may well have something to do with the later course of the *Optis v Apple* proceedings after the Court of Appeal’s decision referred to in my judgment on Trial E as *Optis F (CA)*.
28. Applications under the 1969 Act are rare, and the grant of certificates rarer still: it is a jurisdiction which, in my view, is to be exercised only with great caution. In the present case, that approach must be modified, in my view, given the unusual situation that by giving permission to appeal in Optis F, the Supreme Court has already effectively expressed its own opinion that there is a point of law of general importance at stake and that a hearing by the Supreme Court is justified.
29. Were it only a question of my granting a certificate in relation to the Optis F point, that, in itself ought to be enough but, of course, my judgment in Trial E dealt not only with the consequences of the Court of Appeal’s decision in *Optis F CA*, but matters which Oppo said meant that even if Optis F was rightly decided by the Court of Appeal, it ought to prevail because of the effect of the Chongqing proceedings and/or because, on a proper interpretation of the ETSI undertaking, it is already licensed.
30. On those questions, the Supreme Court has not, by its decision to give permission to appeal in Optis F, expressed a view about whether there is a point of sufficient importance involved.
31. Oppo asks me to make a certificate in respect of each of its grounds of appeal and it does so to protect itself against the scenario where I make a certificate under the 1969 Act, but the Supreme Court then only gives permission on some of the grounds. Oppo wants to be sure that it is able to appeal to the Court of Appeal in the event that the Supreme Court only takes part of the matter.
32. In my view, what subsection (3) and subsection (3A) of section 12 require me to do is to consider my decision as a whole, that decision being that Nokia is right and that Oppo is liable to the relief which I granted yesterday and to ask whether, involved in that decision, is a point of law of general public importance. The subsections do not seem to me to require that I should step through the grounds of appeal, paragraph-by-paragraph and identify whether each of them involves a point of law of general public importance.

33. My decision in my judgment in Trial is that Nokia won and Oppo lost, and that clearly involved a point of law of general public importance in the opinion of Supreme Court, because it depended critically on the result of the decision of the Court of Appeal in *Optis F (CA)*.
34. I, therefore, consider it right to grant a certificate in general terms, that my decision involved a point of law of general importance. The Supreme Court has the power to decide what to do with each issue. There is obviously a real likelihood that it may give permission on the Optis F issue. Whether or not it gives permission on the other issues is different. I am aware from other hearings and from the interest in Trial E that there are numerous other players in the SEP world who would be keen to know the answers to the arguments that Oppo is already licensed, and the effect of parallel proceedings abroad. So it seems to me also to be a possibility that the Supreme Court may give permission on them. It is however entirely a matter for it and it might also prefer that the issues other than the Optis F one follow the conventional appellate course.
35. I pause to spell out explicitly, in case it is not clear already, that in my view the requirements of subsection (3) are met because a point of law of general public importance, to wit the Optis F issue is involved in my decision, and under subsection (3)(b) is one in respect of which I am bound by the decision of the Court of Appeal in *Optis F (CA)*, where the point was fully considered.
36. Since I consider that a certificate is appropriate under subsection (3), it is strictly unnecessary for me to consider subsection (3A), but I would also have considered that that was satisfied under 3A(b), because again my decision involves a point of law of general public importance and I would have considered that a hearing by the Supreme Court is justified on the strength primarily of the fact that the Supreme Court, by giving permission in Optis F has indicated that it itself thought that a hearing was justified.
37. I turn to consider further the procedural matter raised by Oppo, which is that it wants to ensure, to the extent that the Supreme Court does not grant permission on any of the grounds, it is able to appeal to the Court of Appeal.
38. The draft certificate put before me by the defendants spells out in its second paragraph that the relevant conditions of section 12(3) and (3A) are met in respect of each of the grounds. I decline to take that approach for reasons I have already given and I do not think it is appropriate to grant a separate certificate in relation to each ground.
39. The third paragraph of the draft certificate says,
- “That in the event that leave to appeal to the Supreme Court is not granted in respect of any one of the grounds of appeal, the ’022 defendants have permission to appeal to the Court of Appeal in respect of that ground.”
40. It seems to me that that third paragraph of the draft certificate is not a necessary precaution in the light of the decision of the House of Lords in

*Jones v Ceredigion County Council* [2007] UKHL 24, but I suppose it is possible that I might be wrong about that and I see no objection to my making such an order as a further layer of comfort for Oppo.

41. But in the light of the reasons that I gave when I gave permission to appeal in principle yesterday, the proviso must spell out that the defendants do not have permission to appeal to the Court of Appeal if the only ground of that appeal is the competition law point. It would be wrong of me to undermine what I said yesterday, which is that if that were the only point standing, I would not have given permission to appeal.
42. I record and note that Nokia did not make any substantial opposition to the course which I had indicated in the course of argument today and yesterday I was inclined to make. They took the position that it was primarily a matter for me, which I think was both pragmatic and correct.

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**(This Judgment has been approved by the Judge.)**

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